

〈특집: Current Developments in International Economic Law〉

## Harmonizing Europe's Human Rights System<sup>\*</sup>

### - The European Union's Accession to the European Convention on Human Rights -

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#### Abstract

This article gives a brief overview of the European human rights system and the two basic actors, the European Court of Justice (ECJ) and the European Court of Human Rights (ECtHR). It is not surprising that these two courts, which have such different traditions, sometimes interpret the same human rights provisions in a different way. This issue shall be depicted by way of using the example of their differing interpretation of the Article 6 of the European Convention of Human Rights (ECHR) in the cases of *Orkem* before the ECJ, *Funke* and *Saunders* before the ECtHR and finally *Limburgse Vinyl Maatschappij* before the ECJ. In the cases mentioned above, the courts have not only shown fundamentally different approaches to determine the meaning of the *nemo tenetur* principle in cases concerning economic proceedings. The ECJ has also upheld its less human-rights-friendly approach after dealing with the ECtHR's jurisprudence in the matter, thus disregarding the opinion of the court that is competent to interpret the ECHR.

This article afterwards presents one of the major problems arising in the accession process. The European Union (EU)'s fear of external judicial control shall serve as an example for the difficulties arising with the accession of a supranational organization *sui generis* to a convention to which all of its member states are already members. This article presents the proposed solution to this problem, the so-called co-respondent mechanism.

Finally, a brief look into the future poses the question whether the upcoming

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\* The first draft of this article was presented at the 1st Joint Symposium between Seoul National University and Ludwig-Maximilians-Universität München (University of Munich) on "Current Developments in International Economic Law" held in Seoul, Korea from September 21 to 22, 2011.

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accession of the EU to the ECHR can harmonize the human rights jurisprudence in the EU. It is the opinion of the author that such a step has the potential to promote a consistent and understandable European human rights system and to strengthen the European people's trust in the European legal order.

Keywords: accession, co-respondent mechanism, European Court of Human Rights (ECtHR), European Court of Justice (ECJ), nemo tenetur

## I. Introduction

Understandability is an essential prerequisite for trust in a legal order. If people can understand legal decisions and their making, they tend to have fewer problems accepting the system itself. Yet, for most European people, the human rights system of the European Union (EU) seems absurdly complicated, even for the standards of a legal order consisting of 27 member states with various legal traditions. Worst of all, the European courts in Luxembourg and Strasbourg seem to contradict each other in essential questions of the protection of human rights. A solution to this problem could be the upcoming **accession** of the EU to the European Convention on Human Rights (formally the European Convention for the Protection of Human Rights and Fundamental Freedoms, ECHR). Learning from history that every solution in Europe has had its complications, it becomes evident that this act also bears a high potential for conflicts in the future.

## II. The European Courts

A well-known problem in European law is the confusing terminology. Entirely different organs and measures have similar names.<sup>1)</sup> This is also true for the

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<sup>1)</sup> The most prominent example is probably the word “council”. Both the “Council of the European Union” and the “European Council” are organs of the European Union. They

courts that deal with human rights issues in Europe. Judicial protection of human rights on the European level is generally granted by two courts: the **European Court of Justice (ECJ)** in Luxemburg and the **European Court of Human Rights (ECtHR)** in Strasbourg, France.<sup>2)</sup>

## 1. European Court of Justice

The ECJ is the highest judicial organ of the EU, a unique legal entity consisting of 27 member states. What started as a new form of economic cooperation has now reached a never-before seen extent of economic, cultural and political integration.<sup>3)</sup> The ECJ has often fueled this integration with groundbreaking decisions.<sup>4)</sup> In the field of human rights, however, the ECJ has long defended the concept of a mere economic court. In the first years of the ECJ, questions of human rights protection have not played an important part in its jurisprudence.<sup>5)</sup> Although the court's self-concept has changed over the decades, this tradition can still be seen even in recent case-law.

Since the degree of integration is so high in the EU, the ECJ can apply a homogeneous legal regime when dealing with human rights problems in EU law. Nonetheless, the ECJ has shown tendencies to respect to a certain extent the differences in the national legal traditions.<sup>6)</sup>

## 2. European Court of Human Rights

Unlike the ECJ, the ECtHR is an outright human rights court. It was established to enforce the ECHR, a treaty drafted by the Council of Europe, as an

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are not to be confused with the "Council of Europe", an international organization of its own.

<sup>2)</sup> For a good overview of the European human rights system see Steven Greer, Europe, in: Daniel Moeckli/Sangeeta Shah/Sandesh Sivakumaran (Ed.), *International Human Rights Law* (Oxford University Press, 2010), pp.454 et seqq.

<sup>3)</sup> Rudolf Streinz, *Europarecht* (C.F. Mueller, 2012), pp.4-33.

<sup>4)</sup> Rudolf Streinz, *op. cit.*, p.155.

<sup>5)</sup> Rudolf Streinz, *op. cit.*, pp.268-269.

<sup>6)</sup> Rudolf Streinz, *op. cit.*, pp.273-274.

international organization with the goal of promoting cooperation between the European states in the fields of human rights, legal standards, culture and democratic development.<sup>7)</sup> Membership to the Council of Europe is open to all European countries. As a result, almost all European countries have acceded to the ECHR. The Council of Europe now has 47 member states.

The ECtHR has the delicate mission to apply a carefully but sometimes cloudy worded human rights treaty to cases in 47 states with very different legal traditions and socio-economic standards. Apparently it manages this situation very well, which can be seen by the increasing number of cases in the last years.<sup>8)</sup> Ironically, this success and the subsequent “workload crisis”<sup>9)</sup> are one of the biggest problems of the court nowadays.

### III. The European Union’s Human Rights System after the Lisbon Treaty

With the latest reformation of the constitutional basis of the EU through the so-called **Lisbon Treaty**, the EU’s human rights system experienced some significant changes. This can be seen in the changes in the wording of Article 6 of the Treaty on European Union (TEU), which shows the three sources of human rights in the EU.

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<sup>7)</sup> Rudolf Streinz, op. cit., pp.28-33.

<sup>8)</sup> Cf. Annual reports of the ECtHR, available under <http://www.echr.coe.int>.

<sup>9)</sup> Alistair Mowbray, *The European Convention on Human Rights*, in: Mashood Baderin/Manisuli Ssenyonjo (Ed.), *International Human Rights Law – Six Decades after the UDHR and Beyond* (Ashgate 2010), pp.279 et seqq.

### Article 6 TEU (old)

1. The Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States.
2. The Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and as they result from the constitutional traditions common to the Member States, as general principles of Community law.

### Article 6 TEU (new)

1. The Union recognizes the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adopted at Strasbourg, on 12 December 2007, which shall have the same legal value as the treaties.  
(...)
2. The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Such accession shall not affect the Union's competences as defined in the Treaties.
3. Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law.

Article 6 (1) of the TEU now states that the Charter of Fundamental Rights of the European Union, the EU's own human rights charter (which is not to be confused with the ECHR), has the same legal value as the treaties of the EU. This charter comprises a human rights catalogue that is now binding on the EU organs.

Before the Lisbon Treaty, the only relation between the EU and the ECHR was the EU's pledge to respect the fundamental rights as guaranteed by the ECHR.

The new Article 6 (2) of the TEU now calls upon the EU to accede to the ECHR. This would have the same binding effect upon the EU as the accession of any state would have on the said state.

Like before Lisbon, Article 6 (3) of the TEU lays down the commitment to the human rights derived from the ECHR and the constitutional traditions of the member states.

These three sources of human rights in European law are to be the basis of a consistent European human rights system.<sup>10)</sup> Yet, the practice of the European courts in the past has shown a tendency to interpret certain human rights in fundamentally different ways.

#### IV. Inconsistencies in the Jurisprudence of the European Court of Justice and the European Court of Human Rights

A prominent example for the different approach of the ECJ and the ECtHR in the question of human rights protection is their contrarious understanding of the principle of *nemo tenetur* (privilege against self-incrimination) in cases regarding inquiries because of antitrust regulations.

##### 1. ECJ Case C-374/87 of 18 October 1989 – “*Orkem*”

The first of a series of European cases dealing with the problem was the case of *Orkem* before the ECJ. *Orkem* was a French-based chemical company. The European Commission required *Orkem* to answer questions set out in a formal request for information. This was because of an ongoing inquiry into the existence of agreements and concerted practices contrary to the EU antitrust regulations. EU antitrust law required undertakings to cooperate actively in such cases under the threat of sensitive fines. *Orkem* did not produce the answers and relied, *inter alia*, on the principle of *nemo tenetur*. This principle is typically read into Art. 6 of

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<sup>10)</sup> Rudolf Streinz, *op. cit.*, pp.268-276.

the ECHR.<sup>11)</sup>

The ECJ found that a comparative analysis of national law did not indicate the existence of such a principle saying “which may be relied upon by legal persons in relation to infringements in the economic sphere, in particular infringements of competition law.”<sup>12)</sup> It stated that as far as Article 6 of the ECHR was concerned, “although it may be relied upon by an undertaking subject to an investigation relating to competition law, it must be observed that neither the wording of that article nor the decisions of the European Court of Human Rights indicate that it upholds the right not to give evidence against oneself.”<sup>13)</sup> The court found that the European Commission may not compel an undertaking to provide it with answers which might involve an admission on its part of the existence of an infringement “which is incumbent upon the commission to prove.”<sup>14)</sup> However, it concluded that Article 6 of the ECHR did not stand in the way of the European Commission’s conduct.<sup>15)</sup> Consequently, with respect to this specific question, *Orkem*’s application was dismissed.<sup>16)</sup>

It is notable that the ECJ mentioned the lack of relevant case law of the ECtHR before deciding the case since the ECtHR is the primary source for interpretation of the ECHR. This lead lawyers and scholars to expect that a differing decision of the ECtHR would most likely change the ECJ’s jurisprudence with respect to this question.

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11) Wolfgang Peukert, in: Jochen Frowein/Wolfgang Peukert, *Europäische Menschen-RechtsKonvention-EMRK-Kommentar* (Engel, 2009), p.194 (Article 6, para.130); Frank Meyer, in: Ulrich Karpenstein/Franz Mayer, *EMRK-Konvention zum Schutz der Menschenrechte und Grundfreiheiten*, (C.H. Beck 2012), p.173 (Article 6, para. 127).

12) ECJ, Case C-374/87 of 18 October 1989 “*Orkem*”, para. 29.

13) *Orkem*, para. 30.

14) *Orkem*, para. 35.

15) *Orkem*, para. 40.

16) *Orkem*, para. 42.

## 2. ECtHR Case 10828/84 of 25 February 1993 – “*Funke v. France*”

Such a decision came with the case of “*Funke v. France*” before the ECtHR. Jean-Gustave Funke was a German national living in France. The French authorities asked Funke to hand over his bank records in relation to alleged breaches of the French regulations governing financial dealings with foreign countries. Funke was sentenced to a fixed fine and a penalty of 20 francs per day, which was later raised to 50 francs per day, until he would produce the requested bank records. He argued that the compulsion to hand over the documents violated the principle of *nemo tenetur*.

The ECtHR noted that the customs secured Funke’s conviction “in order to obtain certain documents which they believed must exist, although they were not certain of the fact.”<sup>17)</sup> Being “unable or unwilling to produce them by some other means, they attempted to compel the applicant himself to provide the evidence of offences he had allegedly committed.”<sup>18)</sup> In contrast to the ECJ, the ECtHR found that Article 6 of the ECHR indeed contained a privilege against self-incrimination that is also applicable in economic cases.<sup>19)</sup> Accordingly, the court came to the conclusion that there had been a breach of Article 6 of the ECHR.

## 3. ECtHR Case 19187/91 of 17 December 1996 – “*Saunders v. UK*”

After establishing its interpretation of Article 6 of the ECHR in “*Funke v. France*”, the ECtHR upheld and strengthened its line of argument in *Saunders v. UK*. Ernest Saunders was a British national working as a director and chief executive for Guinness PLC. Saunders was questioned several times by the Department of Trade and Industry (DTI) because of alleged unlawful share-support operations in relation to the takeover of Distillers Company PLC. Transcripts from those questionings were later used in the criminal trial against Saunders. The British Court of Appeal did not see a problem with the privilege against self-incrimination and upheld Saunders’ conviction, noticing that “the Parliament has expressly and

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<sup>17)</sup> ECtHR Case 10828/84 of 25 February 1993 – “*Funke v. France*”, para. 44.

<sup>18)</sup> *Funke*, para. 44.

<sup>19)</sup> *Funke*, para. 44.



unambiguously provided in the 1985 Act that answers given to DTI inspectors may be admitted as evidence in criminal proceedings even though such admittance might override the privilege against self-incrimination.”

It was disputed by the government of the United Kingdom that the applicant was subject to legal compulsion to give evidence to the inspectors. He had been obliged under sections 434 and 436 of the Companies Act of 1985 “to answer the questions put to him by the inspectors in the course of nine lengthy interviews of which seven were later admissible as evidence at his (criminal) trial.”<sup>20)</sup> The ECtHR, however, did not accept the government’s argument that “the complexity of corporate fraud and the vital public interest in the investigation of such fraud and the punishment of those responsible could justify such a marked departure as that which occurred in the present case from one of the basic principles of a fair procedure” and concluded that there had been an infringement of the right not to incriminate oneself.<sup>21)</sup>

Conclusively, *Saunders v. UK* was read as a clear affirmation of the ECtHR’s *Funke* jurisprudence and the extensive interpretation of Article 6 of the ECHR in economic circumstances.

#### 4. ECJ Case C-238/99 P of 15 October 2002

##### – “*Limburgse Vinyl Maatschappij*”

It was expected that the ECJ would adopt the ECtHR’s interpretation of Article 6 of the ECHR in similar cases. Surprisingly however, the court upheld its *Orkem* jurisprudence in the case of *Limburgse Vinyl Maatschappij (LVM)*. The chemical company LVM and eight other undertakings were subject to investigations in relation to alleged meetings in order to fix market prices and target quotas in the polypropylene sector. LVM and another applicant disputed the legality, in particular under Article 6 of the ECHR, on all the information obtained from the undertakings by the European Commission in the antitrust procedure.

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<sup>20)</sup> ECtHR Case 19187/91 of 17 December 1996 – “*Saunders v. UK*”, para. 70.

<sup>21)</sup> *Saunders*, para. 74.

The appellants submitted that Article 6 of the ECHR, as interpreted by the ECtHR in *Funke v. France* and *Saunders v. United Kingdom* laid down “a right to remain silent and in no way to contribute to one’s own incrimination, without any distinction being made according to the type of information requested.”<sup>22)</sup> They stated that this right precluded the situation in which an undertaking was itself required “to provide evidence of infringements which it had committed in any form, including documentary form.”<sup>23)</sup>

The parties agreed that there had been further developments in the case-law of the ECtHR since *Orkem* which the EU judicature had to take into account when interpreting the fundamental rights of the ECHR.<sup>24)</sup> However, the ECJ followed that “examined in the light of that finding and the specific circumstances of the present case, the ground of appeal alleging infringements of the privilege against self-incrimination (did) not permit the annulment of the contested judgment on the basis of the developments in the case-law of the European Court of Human Rights.”<sup>25)</sup> It argued that an undertaking is not obliged to reply to a request for information “since the penalty provided for in Article 15 (1) (b) of Regulation No. 17 applies only where, having agreed to reply, the undertaking provides inaccurate information.”<sup>26)</sup>

The case of *LVM* showed that the two European courts still had a fundamentally different understanding of the interpretation and protection of the rights of ECHR. This constitutes the dissatisfying situation in which an identical case would very likely be treated different in Luxemburg and Strasbourg.

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22) ECJ Case C-238/99 P of 15 October 2002 – “*Limburgse Vinyl Maatschappij*”, para. 259.

23) *Limburgse Vinyl Maatschappij*, para. 259.

24) *Limburgse Vinyl Maatschappij*, para. 274.

25) *Limburgse Vinyl Maatschappij*, para. 276.

26) *Limburgse Vinyl Maatschappij*, para. 279.

## V. Accession

A solution to this problem could be the EU's accession to the ECHR as demanded by Article 6 II of the TEU. As a member, the EU and its organs (such as the ECJ) would be bound not only by the wording of the ECHR but also by the decisions of the ECtHR.<sup>27)</sup> ECJ jurisprudence that differs from the ECtHR's interpretation would then constitute a breach of the ECHR for which the EU could be held accountable.<sup>28)</sup>

### 1. Legal Prerequisites for the Accession

As appealing as the accession might be, it requires fundamental changes of the legal constitution of the EU as well as of the ECHR itself.<sup>29)</sup> The idea of the EU's accession to the ECHR has a long and, one might say, frustrating history. But after several decades and countless setbacks this step is now legally achievable.<sup>30)</sup>

The EU fulfilled the basic prerequisites for its accession with the Lisbon Treaty. The new Article 6 (2) of the TEU enables the EU to accede to the ECHR, hence eliminating the lack of a legal basis for the accession that was pointed out by the ECJ in its Opinion 2/94.<sup>31)</sup> Now the EU has a clear and explicit competence to become a member state to the ECHR with all rights and duties that come along with this step.

On the other hand, the Council of Europe prepared the ECHR for the accession of the EU with Protocol 14 to the ECHR in 2010.<sup>32)</sup>

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<sup>27)</sup> This provision is explicitly laid down in Article 46 I ECHR.

<sup>28)</sup> Rudolf Streinz, *op. cit.*, p.275.

<sup>29)</sup> For a good overview of the legal aspects of the accession process see Jean Paul Jacqué, *L'adhésion de l'Union européenne à la Convention européenne des droits de l'homme et des libertés fondamentales*, European Yearbook on Human Rights 11 (2011), pp.143-158.

<sup>30)</sup> Paul Gragl, *Accession Revisited: Will Fundamental Rights Protection Trump the European Union's Legal Autonomy?*, European Yearbook on Human Rights 11 (2011), pp. 159-172, at 159.

<sup>31)</sup> ECJ, Opinion 2/94, Accession by the Community to the European Convention for the Protection of Human Rights and Fundamental Freedoms, 28 March 1996.

But those provisions could not alone solve the countless problems that arise when a legal entity such as the EU enters a human rights treaty to which all of its members are already members. The necessary changes of the constitutional basis through the Lisbon Treaty and the Protocol 14 only set the stage for the long and complex negotiation of the details of the accession process. So far, these negotiations lead to a draft agreement<sup>33)</sup> that will serve as the basis for further talks in this matter.

## 2. Identification of the Correct Respondent

One problem that illustrates the complexity of the legal execution of accession is the EU's fear of an external judicial control of the system of competences of the European treaties. Article 6 (2) (b) of the TEU is owed to this fear.<sup>34)</sup>

The problem becomes evident if an individual lodges an application directly against the EU or an EU-member state. All proceedings must be made against the entity truly responsible for the infringement.<sup>35)</sup> Due to the complicated system of competences in the EU, this question will not be easy to answer for individuals. The Protocol No. 8 to the Lisbon Treaty takes up this idea by stating that the agreement on accession "shall make a provision for preserving the specific characteristics of the Union and Union law, in particular with regard to the mechanisms necessary to ensure that proceedings by non-Member States and individual applicants are correctly addressed to Member States and/or the Union as appropriate."<sup>36)</sup> Still, the main problem is that it is up to the individual applicant

<sup>32)</sup> Protocol 14 was signed by all member states as early as 2006, yet Russia did not ratify it until 2010 due to political reasons.

<sup>33)</sup> I. Draft Agreement on the Accession of the European Union to the Convention for the Protection of Human Rights and Fundamental Freedoms, CDDH-UE(2011)16fin of 19 July 2011.

<sup>34)</sup> Paul Gragl, *op. cit.*, at 160.

<sup>35)</sup> Florence Benoit-Rohmer, *Completing the Transformation: Values and Fundamental Rights in the Treaty of Lisbon*, European Yearbook on Human Rights 10 (2010), pp. 49-64, at 61 et seqq.

<sup>36)</sup> Protocol No. 8 relating to Article 6, para. 2 of the Treaty on European Union on the accession of the European Union to the European Convention on the Protection of

to assign the correct respondent. The complicated situation in the EU with the sharing of competences between the member states and the Union would require the ECtHR to determine whether the assigned respondent is indeed the correct one.<sup>37)</sup> The Strasbourg Court would consequently have to rule on the internal affairs of the EU, namely the division of competences between the EU and its member states.<sup>38)</sup> Such a ruling by any court other than the ECJ would be absolutely unacceptable from the EU's perspective. Hence, the EU's accession calls for a proceeding that enables individuals to open a proceeding before the ECtHR without having the problems of identifying the correct respondent.

The approach chosen by the draft agreement to avoid these delicate problems is the so-called **co-respondent mechanism**, which is laid down in Article 3 of the said agreement. The co-respondent mechanism would enable the EU or a member state to become a co-respondent alongside the original respondent and thus a party to the case. It can already be said that this approach would comply with the specific situation of the EU as a supranational organization with an autonomous legal system becoming a party to a convention to which its members are already members.<sup>39)</sup> But it is only one of several possible solutions to the posed problem.<sup>40)</sup> It remains to be seen whether the co-respondent mechanism will find its way into the final agreement and how it will be formed in detail.

Without a doubt, the EU and the Council of Europe will eventually solve this problem and all the other technical difficulties that arise with the EU's accession to the ECHR. But bearing in mind the novelty of the situation and acknowledging that a thorough work is essential to avoid further complication in future, it remains to be seen how long the accession process will take.

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Human Rights and Fundamental Freedoms.

<sup>37)</sup> Paul Gragl, *op. cit.*, at 166.

<sup>38)</sup> Paul Gragl, *op. cit.*, at 166.

<sup>39)</sup> Paul Gragl, *op. cit.*, at 172.

<sup>40)</sup> Paul Gragl, *op. cit.*, at 171 et seqq.

## VI. Conclusion

The EU's accession to the ECHR seems to be a matter of time. The accession process may take a while, but it will be worth the wait. After the accession, the EU will be held accountable for breaches of the ECHR by its organs. This situation alone will put a lot of pressure on the EU organs to comply with the ECtHR's human-rights-friendly interpretation of the ECHR.

Only time can show whether the accession can also discipline the proudest of all EU organs, the ECJ. It would be desirable, since inconsistencies in the interpretation of fundamental human rights by the European courts cannot be tolerated any longer. The European public is not interested in the legal status or the different competences of the ECJ and the ECtHR. European citizens in Paris, London or Berlin want a reliable system of protection of their human rights. Maybe a little pressure from Strasbourg can lead to a harmonized jurisprudence and a consistent European human rights system. A system which can be understood and really be trusted would be a true blessing for the European continent.

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